UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. S1-4:02 CR 482 JCH DDN
	)	
CASSANDRA HARVEY and JOSHUA HARVEY,	)	
	)	
	)	
Defendants.	)	

ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This action is before the Court upon the pretrial motions of the parties which were referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b). An evidentiary hearing was held on April 17, 2003.

1. Pretrial disclosure of evidence.

Defendant Cassandra Harvey (Cassandra) has moved for disclosure of results or reports of any scientific tests or experiments (Doc. 20), for disclosure of written summaries of testimony of expert witnesses (Doc. 21), and for production of evidence seized (Doc. 23). In response to these motions, the parties agreed that all such evidence and information, which the defendants have a right to receive, either have been provided or will be provided to them. Therefore, these motions will be denied as moot.

Cassandra also has moved for an order compelling the government to cease any forfeiture proceedings and release her assets. (Doc. 22.) Because this is a dispositive matter that depends upon the ultimate trial proceedings, the undersigned will deny the motion without prejudice to its being refiled before the District Judge in the context of the trial.

2. Motions for continued detention.

The United States has moved for the continued detention of defendants Cassandra (Doc. 52) and Joshua Harvey (Joshua) (Doc. 53). In light of the relevant factors, including, in part, that the charged offense involves a narcotic drug, the weight of the evidence, the risk of flight, and the danger to the community, the government's motions are granted. See 18 U.S.C.A. § 3142(g)(1)-(4) (factors to be considered); United States v. Angiulo, 755 F.2d 969, 974 (1st Cir. 1985) (challenged information obtained via electronic surveillance may be considered regarding detention rulings at least until court determines information was illegally obtained).

3. Motion for severance.

Cassandra has moved under Federal Rule of Criminal Procedure 14 for severance of defendants, arguing that (1) it "appears" to her that codefendant Joshua will not only blame her but will use the defense of duress or coercion by her, (2) there will be a serious conflict at trial between her and Joshua's versions of the facts, (3) she will have to defend against both the government's allegations and those of Joshua, and (4) there is a possibility she would not testify at trial and he would testify as to his version of the events. Citing De Luna v. United States, 308 F.2d 140 (5th Cir. 1962), she argues that such circumstances would deny her a fair trial.[1] (Doc. 42.)

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[1]Two or more defendants may be charged in an indictment "if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Fed. R. Civ. P. 8(b). The ten-count superseding indictment in this action charges both defendants in Count I with a conspiracy to unlawfully possess and to distribute BD, between March 13, 2000, and September 18, 2002. Counts II, III, IV, and V allege that Cassandra distributed BD on July 29, July 31, August 5, and August 15, 2002, respectively. She

(continued...)

Rule 14 provides that, if the joinder of defendants in an indictment appears to prejudice a defendant, the court may order separate trials. Fed. R. Crim. P. 14(a). There is a predilection in the federal courts, however, to try all charged co-conspirators together, especially where the proof against each is based upon the same facts and evidence. See United States v. Washington, 318 F.3d 845, 858 (8th Cir. 2003); United States v. Henderson-Durand, 985 F.2d 970, 975 (8th Cir.), cert. denied, 510 U.S. 856 (1993); United States v. Huff, 959 F.2d 731, 736 (8th Cir.), cert. denied, 506 U.S. 855 (1992). Moreover, joint trials are favored because they "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial." Bruton v. United States, 391 U.S. 123, 134 (1968). "In ruling on a motion for severance the district court weighs the inconvenience and expense of separate trials against the prejudice resulting from a joint trial of codefendants." United States v. Brown, 331 F.3d 591, 595 (8th Cir. 2003); see United States v. Lane, 474 U.S. 438, 449 (1986) (the court must decide whether joinder is likely to have a "'substantial and injurious effect or influence in determining the jury's verdict'" (quoted case omitted)).

In De Luna, the majority held,

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[1](...continued)
is alleged in Count VI to have illegally possessed BD on September 18, 2002, and in Count VII to have possessed firearms in furtherance of Count I. In Count VIII, Joshua is alleged to have possessed firearms in furtherance of Count I. Count IX alleges that both defendants conspired between March 13, 2000, and September 18, 2002, to have conducted financial transactions involving the proceeds of the Count I activity. Count X alleges that certain property of defendants is subject to forfeiture under federal law, because it was either the proceeds of or derived from the proceeds of the Count I activity. Because Cassandra does not dispute that these ten counts are sufficiently related for Rule 8(b) purposes--and they are sufficiently related--the undersigned will focus on her Rule 14(a) arguments.

> [i]n a criminal trial in a federal court an accused has a constitutionally guaranteed right of silence free from prejudicial comments, even when they come only from a co-defendant's attorney. If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately.

308 F.2d at 141. It also held that the argument of counsel for codefendant Gomez--that the jury should infer guilty responsibility from de Luna's failure to testify--was proper. Id. at 143 ("[Gomez's] right to confrontation allows him to invoke every inference from de Luna's absence from the stand."). The concurring judge held that it was proper for Gomez's counsel to invoke his client's testimony, "but it was improper for him to comment upon the fact that de Luna had not taken the stand." Id. at 155. Such a comment must be prevented by the trial judge. Id. (such a comment and the resulting inference "must be checkmated by admonition of the court in charge").

"The need for severance often cannot be determined until trial." United States v. McGuire, 827 F. Supp. 596, 596 (W.D. Mo. 1993); accord United States v. Sazenski, 833 F.2d 741, 745-46 (8th Cir. 1987), cert. denied, 485 U.S. 908 (1988) (relevant factors such as the effect of limiting instructions, the strength of the government's evidence, and the receipt of evidence not relevant to all defendants or all counts). For several reasons, the court will deny the motion for severance without prejudice to renewal at trial. First, Cassandra's argument about the expected defense of Joshua and whether he will testify in his own defense is purely speculative at this time. See United States v. Gravatt, 280 F.3d 1189, 1191 (8th Cir. 2002) (the mere fact that defendants have antagonistic defenses does not entitle them to separate trials); see also United States v. Bordeaux, 84 F.3d 1544, 1547 (8th Cir. 1996). Second, the actual circumstances of Joshua's case, if it

goes to the jury, may not unduly prejudice Cassandra, or its potential prejudice may be lessened by cautionary instructions and other trial court rulings. See United States v. Goings, 313 F.3d 423, 426 (8th Cir. 2002) (per curiam) (affirming denial of motion to sever where court instructed the jury that it could not use one defendant's confession against two other defendants). Should it become evident that the trial circumstances work a constitutional deprivation on Cassandra, she may move again at trial for severance.

4. Motions to suppress evidence.

Cassandra has moved to suppress

(1) items seized pursuant to seizure warrants (Doc. 33),

(2) the information received pursuant to a search warrant on WAC Industries (WAC) (Doc. 34),

(3) evidence seized from her person and home (Doc. 35),

(4) interception of electronic communications (Doc. 36),

(5) interception of wire communications (Doc. 37),

(6) wire communications with her attorney (Doc. 38),

(7) telephone records (Doc. 39),

(8) evidence obtained from the search warrant served on Cycle 5 Bookkeeping (Cycle 5) (Doc. 40),

(9) evidence seized from execution of a search warrant on the Bank Star of the Leadbelt (Bank Star) (Doc. 41),

(10) evidence obtained pursuant to a search warrant on Earthlink, Inc. (Earthlink) (Doc. 43), and

(11) evidence seized from PayPal.com, Inc. (PayPal) (Doc. 44).

Defendant Joshua has moved to suppress evidence and statements (Doc. 29), the fruits of illegal electronic and other surveillance (Doc. 30), physical evidence (Doc. 77), and statements (Doc. 78).

At the hearing, counsel for all parties agreed to the government's written stipulations regarding the pretrial motions of

defendants, filed April 16, 2003. By this agreement, the parties stipulated that federal Drug Enforcement Administration (DEA) Special Agent Karin Chinoski would testify and establish the foundation information regarding the admission of Gov. Exs. A-1 to A-28, B-1 to B-10, C-1 to C-12, D-1 to D-8, and E-1 to E-12.

From the evidence adduced at the hearing, the undersigned makes the following findings of fact[2] and conclusions of law:

FACTS

1. During 2002, Agent Chinoski investigated persons suspected of trafficking in 1,4-Butanediol (BD), a controlled substance analogue.[3] From a confidential informant she learned that email account (address) bwize@earthlink.net (BWIZE) was being used for BD distribution. Thereafter, she investigated the BWIZE account, obtained information, and decided to apply, under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, for an order authorizing the interception of communications to and from this account. She learned that such an interception had been done only once before in a federal investigation in the United States.

Original BWIZE interception

2. On June 28, 2002, in Cause No. 4:02 MC 192 CDP, Assistant United States Attorney (AUSA) James Delworth applied to District Judge Catherine D. Perry for an order, under 18 U.S.C. § 2518,

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[2]When relevant, factual findings are also stated in the Discussion portion of this opinion.

[3]A "controlled substance analogue" is defined as a substance "the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II." 21 U.S.C. § 802(32)(A)(i). The superseding indictment alleges that BD is a controlled substance analogue to gamma-hydroxybutyric acid (GHB).

authorizing the interception of electronic communications to and from the user account of BWIZE at Earthlink, an Internet Service Provider (ISP). The application was for the interception of electronic communications of both defendants and Lawrence Waychoff for no longer than thirty days. AUSA Delworth described the subject matter of the investigation as violations of 21 U.S.C. §§ 813, 841, 843(b), and 846, regarding trafficking in a controlled substance analogue; and violations of 18 U.S.C. §§ 2, 1952, 1956, and 1957, regarding unlawful financial activities. He generally described the facts specifically set forth in Agent Chinoski's affidavit and generally concluded that there was probable cause to believe that (1) the three subjects had violated, were violating, and would continue to violate federal drug laws; (2) electronic communications of these subjects, and others unknown, concerning the described offenses would be obtained in the interception of the electronic communications; (3) normal investigative procedures reasonably appeared unlikely to succeed if tried; (4) the BWIZE account was being used and would continue to be used in the commission of these offenses; and (5) there had been no prior applications for the interception of electronic communications described in the application. (Gov. Ex. A-1.) This application had been approved by Bruce C. Swartz, Deputy Assistant Attorney General, Criminal Division. (Id. attach.)

3a. In support of this application, AUSA Delworth submitted the sworn, written affidavit of Agent Chinoski, in which she described her DEA law enforcement background and investigative experience, and the fact that she was currently participating in the subject investigation of defendants, Waychoff, and others unknown. She also described the suspected criminal activity under investigation:

> possession with intent to distribute and distribution of 1,4 Butanediol (a controlled substance analogue), conspiracy to distribute and possess with the intent to

> distribute 1,4 butanediol (a controlled substance analogue), the unlawful use of a communication facility to facilitate distribution of a controlled substance analogue in violation of Title 23, United States Code, Sections 813, 841(a)(1), 843(b), and 846 and the laundering of monetary instruments offenses, engaging in monetary transactions in property derived from specified unlawful activity, using a facility in interstate and foreign commerce to promote, manage, establish, and carry on unlawful activity and facilitate the promotion, management, establishment and carrying on of unlawful activity, attempts and conspiracies to do the same (hereinafter referred to as ITAR and money laundering offenses), in violation of Title 18, United States Code, Sections 2, 1952, 1956 and 1957.

(Gov. Ex. A-2 ¶¶ 2, 3.)

3b. Agent Chinoski identified the same target account for the order sought for the interception of electronic communications set forth in AUSA Delworth's application: BWIZE, subscribed to by "Casandra" Harvey, also known to the investigators as "Cassandra" Harvey. She described Earthlink, which is located in the State of Washington, as the ISP for the target email address and account, and stated that all monitoring activities would take place in the Eastern District of Missouri. (Id. ¶ 4.)

3c. Agent Chinoski described the only two known prior interception applications for the named targets: (1) the interception of electronic communications to and from aspecialdeliverysd@yahoo.com, used by Waychoff, which was authorized by a district judge in the Eastern District of Michigan on April 27, 2002; and (2) the interception of electronic communications to and from larinsd@yahoo.com, used by Waychoff, which was authorized by that same district judge on June 1, 2002. The instant affidavit stated that the monitoring of those accounts was then ongoing. (Id. ¶¶ 8A, 8B.)

3d. She specified the persons expected to be intercepted: the two defendants, who are co-owners of Miracle Cleaning Products (which is run out of Cassandra's residence at 119 North Second

Street in Festus, Missouri); and Waychoff. She averred that Cassandra distributes "her products" over the internet at website "www.abgelfire.com/ar/lactone/index.html"[4] and that the investigators believed Waychoff receives from Miracle Cleaning Products and distributes many kinds of controlled substances, including BD. (Id. ¶¶ 9A, 9B, 9C.)

3e. Agent Chinoski also provided background information about the drug known by the names gamma hydroxy butyrate, sodium oxybate, and gamma hydroxybutyric acid, and also known as G.B. She noted that G.B. is promoted for strength training, bodybuilding, weight loss, and as a sleep aid, but that it is also a nervous system depressant and is harmful to humans, e.g., it can cause loss of consciousness and partial or total amnesia. (Id. ¶ 10.) She also described the Congressional legislation (signed into law on February 18, 2000) and regulatory actions (promulgated on March 13, 2000) that made G.B. a controlled substance. (Id. ¶ 11.)

3f. After describing BD by its several chemical nomenclatures, Agent Chinoski stated that it is an industrial solvent, which, after consumption, is converted by the human body into G.B. She noted that because BD's and gamma-butyrolactone's (GBL)[5] similarity to G.B., BD and GBL came to be substituted for G.B. and sold as dietary supplements and for other purposes, to avoid federal and state laws. She stated that chemical companies use BD for industrial purposes and that individual consumers use it to "get high," as a growth hormone, and to facilitate sexual assault. (Id. ¶ 12.)

3g. She averred that G.B. is consumed by individuals for the same three purposes as BD: as a quick way to "get high," as a

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[4]The reference to "abgelfire" as opposed to "angelfire" in the specified website address appears to be a clerical mistake.

[5]GBL, also an industrial solvent, is another precursor of G.B. BD, like GBL, is converted to G.B. when consumed by the human body.

growth hormone, and to facilitate sexual assault or rape by incapacitating the victim. She described the typical dosage as a "capful." (Id. ¶ 13.)

3h. BD, Agent Chinoski explained, is a controlled substance analogue under federal law, because its chemical structure is similar to G.B., it affects the central nervous system as does G.B.; and persons use it for this effect. (Id. ¶ 14.)

3i. Agent Chinoski also stated that the company Miracle Cleaning Products is not a registered manufacturer or distributor of G.B. or GBL under federal law. (Id. ¶ 17.)

3j. The agent also described the then-current investigation, which determined that "C. Harvey" used an internet website and the BWIZE address to sell products for her business, Miracle Cleaning Products. Earthlink, located in Washington, was the ISP for the email sent directly to C. Harvey at BWIZE. Agent Chinoski stated that the investigation had determined that Cassandra and Joshua sold BD "under the guise of a cleaning solvent" through internet website www.angelfire.com/ar/lactone/index.html. She added that Cassandra distributed products to her customers via United Parcel Service (UPS) to only street addresses, and used the Postal Service for only post office boxes. She averred that defendants' website required all new customers to use accounts established by PayPal, an on-line business that allows account holders to send money to others with email addresses. (Id. ¶¶ 18-21.)

3k. Agent Chinoski described the offerings for sale of GBL on the Miracle Cleaning Products website in April 1999, January 2000, and February 2000: GBL was advertised as an organic and industrial cleaner, and the website stated, "[a]ny other use of said chemical may be forbidden under the laws of various states." On March 13, 2000, the day G.B. became a scheduled controlled substance, the website indicated it was now selling only denatured GBL and offering BD as a new product through the BWIZE address. Again, on

March 23, and in November and December 2000, the Miracle Cleaning Products website advertised BD through the BWIZE address. (Id. ¶¶ 22-28.)

3l. In April 2002, the internet site specified that each customer must provide a statement that the products purchased would be used for industrial purposes only, and must provide a photographic identification that included the customer's name, address, and signature. Agent Chinoski stated that in the expertise of the investigators, these requirements were an attempt to avoid contact with law enforcement officials. In April, the website also advertised other products and directed customers to use PayPal and the BWIZE address. (Id. ¶¶ 29-30.)

3m. Agent Chinoski noted that Miracle Cleaning Products was selling BD as an industrial cleaner for $240 per gallon and that DEA Chemist Agnes Garcia opined that, while BD has some cleaning properties, far better commercial cleaning products were available at a fraction of the cost. Further, Agent Chinoski noted that representatives of BD-manufacturing companies stated that BD was not manufactured for household products, but could be used to strip paint. (Id. ¶¶ 31-32.)

3n. She recounted that on February 8 and March 15, 2002, an investigating police detective retrieved the contents of a trash container outside Cassandra's Festus residence, finding many priority mail and UPS shipping labels addressed to C. Harvey, J. Harvey, or Miracle Cleaning Products, as well as printed copies of email messages addressed to BWIZE from individuals ordering .5 and 1.5 gallon amounts of BD. The fact that one email indicated two individuals were sharing the product ordered suggested to the investigative team that the BD was being used for human consumption--not as an industrial solvent. (Id. ¶¶ 33-34.)

3o. Agent Chinoski described the information learned by investigators about the frequent use of UPS by Miracle Cleaning

Products to ship material, as well as about Cassandra's use of PayPal to traffic in BD. (Id. ¶¶ 34-37.)

3p. The agent's affidavit described Cassandra's and Miracle Cleaning Products' purchases of seventy-nine 55-gallon drums of BD, for $613 per drum, from a chemical distributor from January 2001 to March 2002, and stated that, since March 2002, defendants had been purchasing BD from another source. (Id. ¶¶ 38-40.)

3q. Agent Chinoski also described several investigations which indicated the frequent distribution for human consumption of chemical substances, including G.B. and BD, by Miracle Cleaning Products to persons during the years 2000, 2001, and 2002. These transactions involved the Harveys' website and the BWIZE account. (Id. ¶¶ 41-49.)

3r. Agent Chinoski described a Title III investigation by the DEA's Detroit office of the 2001 and 2002 activities and correspondences of L. Waychoff, who transacted the purchase of BD from Cassandra through PayPal and BWIZE. (Id. ¶¶ 50-51.)

3s. Agent Chinoski described the use of the BWIZE target account. In 2002, the DEA learned that Earthlink, which provides the BWIZE account, does not archive the emails its subscribers send and that their accounts remain connected to the server for up to fifteen hours at a time. The DEA also learned that the accounting operation provided to defendants by PayPal allowed for only limited email communications between them and their customers in the note section of the payment verification emails sent to the BWIZE account. Expert analysis of the communications stored by PayPal, obtained by search warrant, indicated that defendants sold BD for human consumption. (Id. ¶¶ 52-57.)

3t. Agent Chinoski then described the need for the Title III interception and how the investigators had exhausted other investigative techniques, attesting that "normal investigative techniques have been tried and have failed and reasonably appear

unlikely to succeed if tried." (Id. ¶ 58.) She also attested that physical surveillance is inadequate because the subject internet drug trafficking enterprise is different from traditional ones and that there is little public activity to be observed physically. Even successful physical surveillance, she asserted, usually yields evidence that is corroborative in nature, and usually cannot obtain the details of communications, co-conspirators' identities, and supply sources that the interceptions requested by the instant application can obtain. She added that the limited investigative value of physical surveillance was shown by investigators' June 4, 2002, observations of package pick-ups and deliveries at the Harveys' residence; the agents observed only the movement of packages into and out of the residence. (Id. ¶¶ 59-62.)

3u. The use of confidential sources was described as having provided minimal information about Cassandra's sale of products over the internet. Agent Chinoski attested that these sources, although relied on, were not in a position to infiltrate the organization at the level being investigated due to the defendants' compartmentalization of their operation. (Id. ¶ 63.)

3v. She also stated that undercover agents had been used only to observe the website and that, while still being considered, the use of an undercover agent could do little more than contact defendants and order BD, which would merely corroborate information. She added that, in the operation of defendants' business, there would be no face-to-face meeting with defendants or their conspirators, located nationwide and abroad. (Id. ¶¶ 64-65.)

3w. Agent Chinoski discussed the utility of consensual telephone calls; Cassandra had initiated the only two calls with a customer, who disclosed such calls during a proffer. No other consensual uses of the telephone were known. (Id. ¶ 66.)

3x. Agent Chinoski stated that interviews with defendants' associates and conspirators were considered but were believed to be

of limited value, given the compartmentalized nature of their operation and use of the internet. Without a guarantee of confidentiality, such interviews could also compromise the investigation. The interviews so far had provided only historical information about defendants' industrial source of materials, not their customers, and had yielded information of only limited prosecutorial value. (Id. ¶¶ 67-70.) She stated that the content of electronic communications between defendants and their customers would be "the only real evidence that can prove the criminal activity that is believed to be occurring." (Id. ¶ 71.)

3y. AUSA Delworth, according to Agent Chinoski, believed that a grand jury investigation at that time was premature, because the investigation had not yet obtained sufficient information to present for an indictment. Further, grand jury witnesses could invoke their Fifth Amendment right to remain silent and the use of grand jury process could cause the investigation's targets to further camouflage their activities, making prosecution more difficult. (Id. ¶¶ 72-73.)

3z. Agent Chinoski described the investigators' use of search warrants and other court orders to obtain information and opined that such process to obtain Earthlink's records was insufficient because the company's server kept only the unread electronic communications for the BWIZE account. Moreover, a search warrant issued to PayPal resulted in the acquisition only of comment notes attached to email communications. Therefore, she believed that Title III interception of the electronic communications was necessary to obtain the complete electronic communications, and that additional search warrants would be premature and unlikely to yield the desired evidence. (Id. ¶¶ 74-76.)

3aa. The independent investigation of drug trafficker Waychoff, to whom defendants were supplying BD, yielded some

evidence against defendants; however, Waychoff was but one of their customers. (Id. ¶ 77.)

3bb. Pen register and related information obtained on the subject telephone number and two other numbers had allowed the investigators to learn which numbers were used for sending facsimile materials, for voice, and for internet access, but did not identify the participants in the conversations or provide other information. (Id. ¶¶ 78-80.)

3cc. Agent Chinoski described how the interception of communications would be minimized as required by law. All of the communications would be intercepted, copied in their entirety, and stored for later analysis or minimization. Designated personnel would review the working copies of communications and determine whether the communications appeared to be pertinent to the criminal activity under investigation or other activity. For non-pertinent communications, the review would cease (except for later "spot-monitoring" to determine whether they had become criminal in nature). Non-pertinent communications would be sealed and made unavailable to the investigators. (Id. ¶ 80.)

3dd. The affiant requested that the court allow the interception to continue until the full extent of the criminal activity and the participants had been disclosed. (Id. ¶ 81.)

4. On June 28, 2002, Judge Perry issued an order authorizing the interception of electronic communications to and from the BWIZE account, but requiring, inter alia, minimization of non-pertinent communications. (Gov. Ex. A-3.)

5. On or about July 3, 2002, AUSA Delworth issued to the monitoring agents a seven-page set of standards for minimization, describing the procedures and standards for implementing the minimization ordered by Judge Perry. (Gov. Ex. A-4.)

6. On July 8, 2002, the government learned that Earthlink routed outgoing messages regarding the BWIZE account through

equipment leased from UUNET Technologies, Inc. (UUNET). The June 28 order was not implemented because it did not include UUNET.

7. Therefore, on July 10, 2002, AUSA Jeffrey B. Jensen applied for an amended order for interception of the electronic communications for the BWIZE account, this time including UUNET. (Gov. Ex. A-5.) In support of this application, Agent Chinoski submitted her sworn "amended affidavit," which was identical to the June 28 affidavit (Gov. Ex. A-2), with the exception that the amended affidavit included information about the June 28 application and order, and the newly acquired information about Earthlink's leasing of UUNET's equipment. (Gov. Ex. A-6.) On July 10, 2002, Judge Perry issued an amended order, authorizing the interception of electronic communications to and from the BWIZE account at Earthlink and at UUNET. (Gov. Ex. A-7.)

8. Title III surveillance equipment, purchased by the DEA, was installed on UUNET's servers with help from UUNET technicians.

9. Before the Title III surveillance began, Agent Chinoski conferred with AUSAs Delworth and John Davis in St. Louis, as well as with personnel at the Department of Justice's main office in Washington, D.C. They discussed the methodology by which the surveilling agents would minimize the reading of email messages, i.e., by separating the pertinent and non-pertinent ones.

10. The government determined that the pertinent email messages were those which involved the subject matter of the investigation to that point: defendants, Miracle Cleaning Products, and the contraband (BD).

11. The operation of the Title III surveillance involved a specific methodology. Twice a day all email messages were downloaded or copied onto a DEA computer; copies were then read by a team of three DEA intelligence analysts and a group supervisor. Determinations were made about whether the messages were pertinent: pertinent messages were printed and photocopied and put into a

sealed envelope for Agent Chinoski's investigative use, whereas non-pertinent messages were printed and placed in a separate envelope with an electronic compact disc copy of those messages. No non-surveilling investigator, including Agent Chinoski, saw or read the non-pertinent messages. After the first thirty days of the surveillance, the computer hard drives on which the pertinent and non-pertinent messages were stored were placed in evidence bags which were sealed closed by the District Judge who authorized the Title III surveillance. These evidence bags were stored in a secure DEA vault. The monitoring and surveillance activities of the monitoring agents were performed in a physically secured room; passwords were used to secure access to the electronic equipment and databases.

12. Following the issuance of the Title III order on July 10, 2002, the government filed three ten-day reports on the progress of the interceptions, the numbers of pertinent and non-pertinent interceptions, and the communications' contents. (Gov. Exs. A-8, A-9, A-10.)

13a. On August 6, 2002, AUSA Davis applied for continued interception of electronic communications to and from BWIZE. (Gov. Ex. A-13.) In support, he submitted Agent Chinoski's sworn affidavit. She recounted the earlier applications and interception orders. As persons whose communications were expected to be introduced, Kristian Martinez in Utah, Joseph Eugene Baker in California, and Christopher Blake Deeter in Texas, were added to the Harveys and Waychoff. (Gov. Ex. A-14 ¶¶ 1-11.) The investigation was described and summaries of twelve intercepted communications were provided, indicating that defendants and co-conspirators had been using the BWIZE account to facilitate distribution of BD for human consumption and of other chemicals to convert GBL into GHB. The agent averred that of 1,243 email

messages intercepted, 763 were deemed pertinent and 480 were deemed non-pertinent. (Id. ¶¶ 12-14.)

13b. The affidavit for the first extension recounted how leads are developed from the interceptions and are investigated. Other DEA divisions used the information to develop probable cause for controlled deliveries and search warrants. (Id. ¶¶ 15-24.)

13c. Agent Chinoski described the continued need for the interceptions; and the limited likely success of physical surveillance, confidential sources, consensual telephone calls, interviews, undercover agents, grand jury process, pen registers and similar techniques, and search warrants. She also described how the DEA in St. Louis was able to establish a confidential source to make controlled purchases of BD and contended the continued interception of BWIZE was necessary to complement the confidential source's work. Again, the procedures for minimizing the non-pertinent interceptions were described. (Id. ¶¶ 25-48.)

14. On August 6, 2002, District Judge Charles A. Shaw issued his order extending the electronic interceptions to and from the BWIZE address for another thirty days. (Gov. Ex. A-15.)

15. On August 16, 2002, the government filed its fourth ten-day report on the interception of electronic communications to and from BWIZE. (Gov. Ex. A-16.)

16. On August 20, 2002, AUSA Delworth filed an amended application for the continued interception, seeking to add Level 3 Communications, LLC (Level 3), to Earthlink and UUNET, because Agent Chinoski had learned from Earthlink that Cassandra had switched internet access telephone numbers to one provided by Level 3, a network provider for Earthlink. (Gov. Ex. A-17.)

17. On August 20, 2002, based on this application, District Judge Rodney W. Sippel issued an amended order for the interception of the electronic communications to and from BWIZE via the three said companies. (Gov. Ex. A-18.)

18. On August 29 and September 9, 2002, the government filed its fifth and sixth ten-day reports regarding the interceptions of electronic communications to and from BWIZE. (Gov. Ex. A-19 to A-20.)

19a. On September 13, 2002, AUSA Davis applied for a second continued interception of electronic communications to and from BWIZE via Earthlink and UUNET (Gov. Ex. A-23), along with an affidavit in which DEA Agent Chinoski swore that two to three days after Cassandra began using Level 3, she returned to using the UUNET's services. (Gov. Ex. 24 ¶¶ 1-7.)

19b. Agent Chinoski's affidavit described the prior applications for interceptions (id. ¶¶ 8-9) and summarized the most recently intercepted communications relating to BD distribution (id. ¶¶ 10-11). She identified seven persons whose communications were likely to be intercepted (id. ¶ 12) and described the contents of pertinent interceptions (id. ¶¶ 13-17). She described related investigations (id. ¶¶ 18-32), explained the need for the interception and the exhaustion of other investigative techniques, (id. ¶¶ 33-56), and described the efforts that were taken to minimize intercepting non-pertinent communications (id. ¶¶ 57-58).

20. By order dated September 13, 2002, Judge Sippel authorized the second continued interception of electronic communications to and from BWIZE. (Gov. Ex. A-25.)

21. On September 23, 2002, the government filed its seventh ten-day report. (Gov. Ex. A-26.)

II. Interception of 636-937-0261

22a. On August 22, 2002, AUSA Davis applied for an order authorizing the interception of wire communications to and from 636-937-0261, the phone number of Cassandra's Festus residence. (Gov. Ex. B-1.) He attached the sworn affidavit of Agent Chinoski, who identified nine target individuals for distributing BD,

conspiring to distribute it, unlawfully using a communication facility to facilitate the distribution of a controlled substance analogue, and laundering the proceeds of such unlawful activity. (Id. ¶¶ 1-7.) Agent Chinoski described the prior orders authorizing the interception of communications to and from BWIZE on June 28, 2002; the amended order of July 10, 2002; the order for the continued interception on August 6, 2002; and the orders issued by the district judge in Michigan on April 27 and June 1, 2002. (Id. ¶¶ 8-11.) She also described the persons whose conversations were expected to be overheard: defendants, Waychoff, Martinez, Baker, Deeter, Danny Marc Audet, John Roberts, and Donna Steffler. (Id. ¶ 12.)

22b. Agent Chinoski also provided the same information about gamma hydroxybutyrate[6] that was set forth in the original and amended affidavits of June 28 and July 10, 2002, for the interception of communications to and from BWIZE, Gov. Exs. A-2 and A-6. (Gov. Ex. B-2 ¶¶ 13-20.)

22c. She also described the facts and circumstances of the current investigation, including interception activities and summaries of communications (id. ¶¶ 21-23), and analyses of pen register and enhanced caller identification efforts (id. ¶¶ 24-25). The affidavit also described the efforts to follow leads indicated by the interception of email communications. (Id. ¶¶ 26-37.)

22d. The affidavit further explained that

> [d]espite having learned the above information as a result of the electronic interception order, the need for a wire interception order on Harvey's home telephone is essential for the further development of investigations both nationally and internationally. Through the analysis of the pen register and enhanced caller

[6]The instant affidavit referred to the drug as "GHB," while the earlier affidavits referred to it as "G.B." See Gov. Exs. A-2 ¶ 10, A-6 ¶ 10, B-2 ¶ 13.

> identification data, it has been determined that Harvey communicates with her customers over her home telephone number 636-937-0261. Further, when comparing e-mail interceptions which discuss the legality of 1,4 butanediol and the pen register data, it appears that Harvey prefers to verbally discuss, as opposed to e-mail as a means to discuss, 1,4 butanediol. Additionally, Harvey appears to be very cautious when discussing the use of 1,4 butanediol while communicating over the Internet, supported by an e-mail interception in which Harvey tells the customer that if he would like to continue a conversation about the legality of 1,4 butanediol, he should call her at her residence (Reference Roman Numeral V, Letter P). It is the belief of this Affiant that Harvey utilizes her telephone to discuss human consumption and the legality of 1,4 butanediol. Harvey utilizes the Internet to build a rapport with her customers and to distribute the product, but any other communication that would be considered sensitive in nature (i.e. human usage, law enforcement etc.) Harvey utilizes the target telephone 636-937-0261.

(Id. ¶ 38.)

22e. The affidavit also provided current information about the investigation of Waychoff and his email communications of July 16 and 17, 2002. (Id. ¶ 39.)

22f. The affidavit further described the investigators' need for the interception and the exhaustion of other investigative technologies. Agent Chinoski gave reasons for her belief that the interceptions of wire communications to and from 636-937-0261 are "the most viable means of investigation and will provide the best chance of revealing the full scope and nature of the offenses being investigated and develop admissible evidence against the subjects of the investigation." (Id. ¶¶ 40-63.)

22g. She also described the procedures in place for minimizing non-pertinent communications that were intercepted. Necessarily, the procedures differed somewhat from those put in place for intercepted email communications. Monitoring of the voice communications would terminate immediately upon the determination that the conversation was not related to those lawfully

intercepted. Minimized conversations would be "spot checked" to be sure their topics had not turned to criminal matters. (Id. ¶ 64.)

23. On August 22, 2002, based upon this affidavit, Judge Sippel issued an order authorizing the interception of wire communications over 636-937-0261. (Gov. Ex. B-3.)

Interception of wire communications with attorney

24. Also on August 23, 2002, the government applied for a court order authorizing the interception, under certain limited conditions, of wire communications with an attorney over telephone number 636-937-0261. (Gov. Ex. B-4.) The basis for the application was that the government had learned in the court-authorized interceptions that Cassandra planned "to contact an attorney to set up an 'off shore' bank account in order to launder her illegal proceeds from the distribution of a controlled substance analogue." (Id. ¶ 2.) The conversations expected to be intercepted were "ongoing criminal activity" and not covered by the attorney-client privilege. (Id. ¶ 3.)

25. In support, the government submitted Agent Chinoski's sworn affidavit describing two intercepted telephone conversations between Joshua and Cassandra that occurred in calls to 636-937-0261. In the first, on August 22 at 6:54 p.m., they discussed setting up accounts for the transfer of money and living abroad. In the second, on August 23 at 3:00 p.m., Cassandra told Joshua that she had met with an unnamed attorney who provided legal advice about the government's ability to seize assets involved in illegal drug trafficking and that she planned to see the lawyer. They also discussed actions to protect their assets from the DEA. (Gov. Ex. B-4 attach. ¶ 5.[7])

[7]Two consecutive paragraphs are labeled "5." The latter paragraph 5 is the relevant one.

26. On August 23, 2002, District Judge Stephen N. Limbaugh approved the application. (Gov. Ex. B-4.)

27. On September 5, 12, and 23, 2002, the government filed its first, second, and third ten-day reports of its interception of wire communications over 636-937-0261. Judge Sippel approved each report. (Gov. Exs. B-6 to B-8.)

Pen Register and Enhanced Caller Identification Orders

636-937-0261

28. On February 26, 2002, the government applied for orders authorizing the installation and use of pen register and enhanced caller identification devices, pursuant to 18 U.S.C. § 3122, to acquire information about the use of telephone numbers 636-937-0261, 636-937-7294, and 636-937-3763. Each of the three applications, signed under penalty of perjury by an AUSA, stated that the information likely to be obtained would be relevant to an ongoing DEA investigation of defendants' federal drug law violations. On February 26, Magistrate Judge Audrey G. Fleissig granted the applications authorizing the installation of the devices for a sixty-day period. (Gov. Ex. C-1, C-5, C-9.)

29. On April 24, June 20, and August 16, 2002, applications for extensions of the February 26 orders were filed and approved by the court for additional sixty-day periods. (Gov. Exs. C-2 to C-4, C-6 to C-8, C-10 to C-12.)

Search Warrants

PayPal

30. On May 31, 2002, Agent Chinoski applied for a search warrant for records in the custody of PayPal relating to Cassandra using the email address BWIZE. In support, she submitted a sworn affidavit in which she described the DEA investigation of defendants and Miracle Cleaning Products, including how the

business used BWIZE to sell a cleaning solvent as a front for the illegal distribution of BD for human consumption and that it required its customers to use PayPal's services. (Gov. Ex. D-1.)

31. On May 31, 2002, Magistrate Judge Terry I. Adelman issued his search warrant for Cassandra's records at PayPal. (Id.)

Earthlink.net

32. On June 13, 2002, Agent Chinoski applied for a search warrant for records of Cassandra using BWIZE in the custody of Earthlink, attaching a sworn affidavit in which she described the DEA investigation of defendants and Miracle Cleaning Products, including how the business used BWIZE to sell a cleaning solvent as a front for the illegal distribution of BD for human consumption and that it required its customers to use PayPal's services. She stated that Earthlink was the ISP for the BWIZE address and would have records that were evidence of federal drug law violations. (Gov. Ex. D-2.)

33. On June 13, 2002, Judge Adelman issued his search warrant for Cassandra's records at Earthlink. (Id.)

PayPal

34. On September 12, 2002, Agent Chinoski applied for another search warrant for records in the custody of PayPal relating to Cassandra's using the BWIZE address. She attached a sworn affidavit in which she described the DEA investigation of defendants and Miracle Cleaning Products, including how the business used BWIZE to sell a cleaning solvent as a front for the illegal distribution of BD for human consumption and that it required its customers to use PayPal's services. Further, she described the information learned in the investigation after the first search warrant for PayPal was issued. This information indicated the continued use of the BWIZE account and the continued

use of PayPal for the drug trafficking under investigation. (Gov. Ex. D-3.)

35. On September 12, 2002, the undersigned Magistrate Judge issued a search warrant for the records of Cassandra at Earthlink. (Id.)

119 North Second Street, Festus, Missouri
and
1377 Scenic Drive, Herculaneum, Missouri

36. On September 13, 2002, Agent Chinoski applied for search warrants for 119 North Second Street and 1377 Scenic Drive. In support, she submitted identical sworn affidavits in which she described the investigation of defendants and their illegal trafficking in BD. The affidavits described how Cassandra's 119 North Second Street residence was the destination of shipments of BD after it had been repackaged from large containers into smaller bottles. (Gov. Ex. D-4.)

37. The affidavits stated that 1377 Scenic Drive is also a residence of defendants which, along with 119 North Second Street, is where defendants use communications facilities to violate 18 U.S.C. §§ 1956 and 1957 (money laundering and performing illegal money transactions). Agent Chinoski attested that the two residences have a significant role in an ongoing, national and international BD distribution conspiracy, that the conspiracy generates substantial amounts of money, and that there is probable cause to believe currency and BD will be present at these locations. (Gov. Ex. D-5 Aff. ¶ 22.) She also averred that, based upon her training and experience, as well as that of her investigative team, she believed that drug traffickers use their residences for many described purposes to support their illegal drug activities. (Id. ¶ 23.)

38. On September 13, 2002, Magistrate Judge Mary Ann L. Medler issued search warrants for 119 North Second Street and 1377 Scenic Drive. (Gov. Exs. D-4, D-5.)

39. On September 18, 2002, the Scenic Drive search warrant was executed. A forced entry was required after a special agent's repeated announcements of the presence of the officers and that they had a search warrant went unacknowledged. Joshua Harvey was found in the bedroom of the residence. In addition to the search warrant, there was a federal arrest warrant for Joshua for conspiracy to distribute BD. He was handcuffed and taken to a police vehicle. In the vehicle, DEA-trained agent Gary Fourtney, in the presence of another agent, orally advised Joshua of his constitutional rights to remain silent and to an attorney. After stating that he understood his rights, Joshua agreed to be interviewed. He appeared to be alert and not intoxicated; he was not physically abused. During the interview inside the vehicle, which lasted approximately twenty minutes, Joshua made several statements.

WAC Industries

40. On September 13, 2002, Agent Chinoski applied for a search warrant for WAC Industries, located at 8520 Mackenzie Road, St. Louis, Missouri, seeking records of the business relationship between Cassandra and WAC. In support, she submitted her sworn affidavit in which she described the investigation of defendants and their illegal trafficking in BD. She also described intercepted telephone conversations in which Cassandra spoke with persons at WAC about WAC filling her orders for the repackaging of BD into smaller containers. (Gov. Ex. D-6.)

41. On September 13, 2002, Magistrate Judge Medler issued a search warrant for WAC. (Id.)

Cycle 5 Bookkeeping

42. On September 13, 2002, Agent Chinoski applied for a search warrant for the records of defendants and Miracle Cleaning Products at Cycle 5 Bookkeeping at 3904 Laclede, second floor, St. Louis, Missouri 63108. As to information describing the investigation into the Harveys' dealing in BD, the affidavit described intercepted telephone conversations in which Cycle 5 was described as their bookkeeper and in which Cycle 5's Gary Johnson advised Cassandra about shielding their money from the government. (Gov. Ex. D-7.)

43. On September 13, 2002, Judge Medler issued a search warrant for Cycle 5. (Id.)

Safe Deposit Box No. 81

44. On September 18, 2002, DEA Special Agent Gary Thiedig applied for a search warrant for Safe Deposit Box No. 81 at Bank Star in Festus, Missouri. In his supporting affidavit, Agent Thiedig described the investigation into defendants' trafficking in BD. He stated that proceeds of this drug trafficking were transferred from PayPal to a business checking account at this bank and that intercepted conversations and physical surveillance indicated that defendants had placed illegal drug trafficking proceeds in a safe deposit box at Bank Star in their own names. (Gov. Ex. D-8.)

45. On September 18, 2002, Magistrate Judge Thomas C. Mummert issued a warrant to search the safe deposit box. (Id.)

Seizure Orders

$128,000

46. On September 3, 2002, Agent Chinoski applied for a seizure warrant for $128,000 in the custody and control of defendants, submitting in support a sworn affidavit in which she

described the investigation of defendants and their illegal BD trafficking. The agent summarized intercepted telephone conversations in which Cassandra confirmed that she had $128,000 in the bank and intended to cash a cashier's check to withdraw the money. Agent Chinoski also recounted information indicating that defendants intended to take the proceeds of their illegal drug trafficking out of the United States. (Gov. Ex. E-1.)

47. On September 3, 2002, Judge Mummert issued a seizure order for the $128,000. (Id.)

Seizure warrants issued September 17, 2002

48. On September 17, 2002, Agent Chinoski applied for seizure warrants for the following assets:

a. all proceeds in account no. 048227354, in Cassandra's name at E. Trade Securities, P.O. Box 989030, West Sacramento, California 95798 (Gov. Ex. E-2);

b. all proceeds in account no. 2508435 in the name of Miracle Cleaning Products at Bank Star in Festus (Gov. Ex. E-3);

c. all proceeds in account no. 13501 in Joshua's name at Bank Star in Festus (Gov. Ex. E-4);

d. all proceeds in account no. 3537250 in Cassandra's name at Bank Star in Festus (Gov. Ex. E-5);

e. all proceeds in account no. 216023382801153442 in Cassandra's name at PayPal, 303 Bryant Street, Mountain View, California 94041 (Gov. Ex. E-6);

f. all proceeds in account no. 2156239139007384416 in Joshua's name at PayPal in Mountain View (Gov. Ex. E-7);

g. 1999 Cadillac, VIN 1G6KF5490XU723897, registered to Cassandra and Joshua (Gov. Ex. E-8);

h. 2000 Harley Davidson XL883C motorcycle, VIN 1HD4CJM10YK128478, registered to Joshua (Gov. Ex. E-9);

i. 2000 Dodge Dakota, VIN 1B7HG2AZ1YS777360, registered to Miracle Cleaning Products (Gov. Ex. E-10);

j. 1997 Chevrolet Camaro, VIN 2G1FP22P5V2141544, registered to Cassandra and Joshua (Gov. Ex. E-11); and

k. all proceeds in account no. 1169011234609666331, in the name of Cassandra at PayPal in Mountain View (Gov. Ex. E-12).

49. In support of these applications, Agent Chinoski submitted separate but identical sworn affidavits containing information that the described assets were the proceeds of defendants' unlawful trafficking in BD. (Gov. Exs. E-2 to E-12.)

50. On September 17, 2002, Judge Mummert issued seizure warrants for each of the assets described above. (Id.)

DISCUSSION

Much of the arguably suppressible evidence acquired by the government in its investigation came from court-authorized monitoring and copying of electronic communications to and from the BWIZE email address, and from the court-authorized wiretap interception of conversations to and from telephone number 636-937-0261. Some of this information was used by the government in Agent Chinoski's affidavits to show a lawful basis for the issuance of the seizure warrants, search warrants, and other court process, described above.

Defendants have moved to suppress the evidence acquired from the internet address and account and from the telephone number, and to suppress the evidence acquired from the execution of the other orders and warrants, because the information was unlawfully acquired from the internet address and the telephone number.

The court will first take up the motions to suppress the electronic communications to and from the internet address and account and the voice communications over the telephone number.

Title III interceptions of electronic communications

Title III generally prohibits the government from conducting a wiretap investigation without first obtaining an approval order from a judicial officer. See 18 U.S.C. §§ 2510-2520.

A federal judge may issue an order authorizing or approving the interception of wire or oral communications, upon a proper application of the United States. 18 U.S.C. § 2516(1). Title III requires that the application (a) identify the applicant for the interception order; (b) detail the factual basis for issuance of the order, including details about the offenses under investigation, a description of the facilities where the communications are to be intercepted, a description of the type of communication to be intercepted, and the identities of the interceptees; (c) state why normal investigative procedures would be unsuccessful; (d) state the time the interception would be in effect; (e) describe prior applications; and (f) describe the results of the interception, when application is made for an extension of the order. 18 U.S.C. § 2518(1)(a)-(f).

The judge may issue the order upon determining that (1) there is probable cause to believe that an individual is committing, has committed, or is about to commit one of the crimes described in 18 U.S.C. § 2516; (2) there is probable cause to believe that particular communications concerning the offense will be obtained through such interception; (3) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; and (4) there is probable cause to believe that the facilities or the place from which the communications are to be intercepted are being used, or are about to be used, in connection with the commission of the offense, or are connected with the subject individual. 18 U.S.C. § 2518(3)(a)-(d); United States v. Milton, 153 F.3d 891, 895 (8th Cir. 1998), cert. denied, 525 U.S. 1165 (1999).

Every such interception order must contain a provision requiring the government to minimize the interception of communications unrelated to the illegal activity specified in the application. See 18 U.S.C. § 2518(5); United States v. Fairchild, 189 F.3d 769, 774 (8th Cir. 1999). Wiretap orders are valid for no more than thirty-day intervals, but may be renewed upon an application with the court for an extension of time. See 18 U.S.C. § 2518(5). Each extension request must meet the same probable cause requirements as the original application. See id.

The probable cause showing necessary to support the issuance of a Title III order is the same that is required under the Fourth Amendment to support the issuance of a search warrant. Fairchild, 189 F.3d at 775. "Specifically, probable cause is present if the totality of the circumstances reveals that there is a fair probability that a wiretap will uncover evidence of a crime." Id.; accord Illinois v. Gates, 462 U.S. 213, 233-34 (1983) (rejecting rigid two-prong analysis of "veracity" and "basis of knowledge" in favor of flexible analysis of reliability under totality of circumstances).

In essaying the probable cause showing, the affidavit must be construed in a realistic fashion. The issuing judge's determination of probable cause should be accorded "great deference" by reviewing courts. United States v. Oropesa, 316 F.3d 762, 766 (8th Cir. 2003); Unites States v. Sundby, 186 F.3d 873, 875 (8th Cir. 1999) (considering only whether the judge had a substantial basis for finding probable cause). The probability, and not a prima facie showing, of criminal activity is the standard of probable cause. Smithson v. Aldrich, 235 F.3d 1058, 1062 (8th Cir. 2000). Probable cause affidavits are tested by much less rigorous standards than those governing the admissibility of evidence at trial. United States v. Bulgatz, 693 F.2d 728, 730-31 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); cf. United

States v. Iron Cloud, 171 F.3d 587, 591 (8th Cir. 1999). A supporting affidavit must be viewed as a whole. Technical Ordnance, Inc. v. United States, 244 F.3d 641, 649 (8th Cir. 2001); see also Walden v. Carmack, 156 F.3d 861, 870 (8th Cir. 1998) ("Applications and affidavits should be read with common sense and not in a grudging, hyper technical fashion."). A party challenging the validity of a federal wiretap order must show a substantial, not just a technical, deviation from the requirements of the statute. United States v. Fairchild, 189 F.3d 769, 774-75 (8th Cir. 1999). Moreover, "[a] wiretap authorization order is presumed valid, and the defendant bears the burden of proof to show otherwise." United States v. Radcliff, 331 F.3d 1153, 1160 (10th Cir. 2003).

A defendant may move for suppression of evidence obtained through a wiretap on three grounds: (i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval. 18 U.S.C.A. 2518(10)(a)(i)-(iii).

Doc. 36--Information from BWIZE

Cassandra has moved to suppress the evidence acquired by the government in the interception of electronic communications from the BWIZE email address. She argues that the government failed to establish that normal investigative procedures were tried and failed, or reasonably appeared to be unlikely to succeed if tried, or to be too dangerous, as required by § 2518(1)(c). Cassandra further argues that Agent Chinoski stated in her affidavit that the investigative team had used all of the normal methods of investigation (UPS records, PayPal records, email information from another email address, seizure of defendant's trash, information from defendant's website, interviews with individuals and

companies, including Vopak, a supplier of BD, the seizure of evidence from others, information from confidential informants, statements from persons under arrest, and information from evidence seized from search warrants), except the efforts of an undercover agent and grand jury process.

Cassandra argues that the government could have obtained information from the use of an undercover agent who could purchase the asserted contraband from her over the internet. She argues that there are no exigent circumstances, such as the immediate cessation of the illegal business operation, to warrant the need for immediate wiretap. Further, she abjures Agent Chinoski's assertions that the use of an informant would not be productive, because defendants' operation was compartmentalized and there was no guaranty of confidentiality. She argues that the use of an informant would have been the "ideal way" to obtain information.

The undersigned disagrees with defendant's arguments. At the time of the applications, the record supported the government's assertion that the introduction of an undercover agent into the investigation would have yielded little new information. Defendants' involvement in the trafficking operation under investigation was apparent from the internet. To introduce an undercover agent as a customer would have added little to the investigation, given the then-guarded nature of defendants' communications with their customers. See United States v. Nguyen, 46 F.3d 781, 783 (8th Cir. 1995) ("As stated in the wiretap application, the defendants were believed to be a tight-knit group which would be difficult for an undercover officer to penetrate."); United States v. Falls, 34 F.3d 674, 682 (8th Cir. 1994) (noting affidavit's description of subject organization as "close" and "secretive"). The government sufficiently showed the inadequacy of an undercover agent when compared with the amount and nature of the information expected from the electronic monitoring of the internet

address. See United States v. Agrusa, 541 F.2d 690, 694 (8th Cir. 1976), cert. denied, 429 U.S. 1045 (1977).

Further, Cassandra argues that Agent Chinoski's statement was untrue that the use of grand jury process would not be feasible, because it would disclose the investigation, the targets would destroy evidence, and people's invocation of their Fifth Amendment rights would compromise the investigation. She contends that this argument is gainsaid by the affiant's statements that the government had used wiretaps on other computers, interviewed other buyers of BD, and used two search warrants in other jurisdictions, plus the fact that the government could offer witnesses immunity or leniency.

The undersigned disagrees with defendant's arguments. The use of grand jury process would not have been an efficient and effective means to acquire the very specific information sought by the investigators when the Title III orders were requested. Such process, including search warrants, would not have acquired candid realtime conversations discussing criminal activities. The use of grand jury process could have damaged the investigation by informing defendants of the investigation and causing them to flee or destroy evidence. Moreover, "section 2518(1)(c) and (3)(c) does not require the government to exhaust every available investigative technique before a wiretap may be authorized." United States v. O'Connell, 841 F.2d 1408, 1415 (8th Cir.), cert. denied, 487 U.S. 1210 (1988).

Cassandra argues that the August 6, 2002, application and affidavit for an extension of the wiretap (Gov. Exs. A-13, A-14) incorrectly stated that normal investigative procedures were tried and failed or reasonably appeared to be unlikely to succeed if tried or would be too dangerous. This assertion, she argues, was incorrect because the affidavit included information derived from

search warrants and evidence seized from persons other than Cassandra.

The undersigned disagrees. Once again, as set out in the affidavit's descriptions of pertinent intercepted conversations, the nature of the evidence sought by the government through the use of the interceptions of realtime candid electronic conversations is very different from the evidence that could be obtained through search warrants and interview recollections of witnesses. The searches of arrested people yielded contraband BD, not the content of conversations in which defendants participated. Further, the affidavit stated that search warrants for the BWIZE records with PayPal yielded only comment notes from customers in their email payments for defendants' material.

Cassandra argues that the statement in paragraph 23 of the affidavit that defendant has a personal relationship with her existing customers that exceeds the normal business relationship belies the affiant's other statements that it would be difficult for a confidential source to infiltrate defendant's business. And she argues that paragraph 31 of the affidavit indicates that a DEA agent had a confidential source who has had email communications with Cassandra.

The undersigned disagrees with these arguments. The affidavit also stated, "agents have been able to observe HARVEY's cautiousness in developing new clientele and the customary manner and means HARVEY uses in dealing with existing customers when receiving, responding to and shipping orders." (Gov. Ex. A-14 ¶ 23.) Paragraph 31's confidential source's means of communication with defendants was described as email communications. Once again, this source was only one customer and the interception of all of the electronic communications to and from BWIZE would be necessary to obtain information about the breadth of the illegal drug trafficking. See United States v. Iiland, 254 F.3d 1264, 1268

(10th Cir. 2001) (wiretaps were necessary to develop the full scope and breadth of the conspiracy).

Cassandra argues that the August 20 and September 13 applications for wiretap extensions were unfounded in their assertions that the internet was the primary means of communication between her and her clients, given that on August 22, 2002, Agent Chinoski applied for an order for the interception of communications over Cassandra's 636-937-0261 telephone number. Further, she argues that the affidavit misrepresented a material fact to the court by stating that a confidential source would not be able to engage Cassandra in conversations about BD when in paragraphs 41 and 42 it stated that the government used a confidential source to buy contraband from her.

These arguments are unavailing. The mere fact that one mode of communications is alleged to be a primary one does not mean that it must be the exclusive mode. Similarly, to state that a confidential source was able to purchase a quantity of controlled substance from Cassandra is not the same as stating that such a person would be able to engage Cassandra in a conversation about the substance, much less a conversation that would yield valuable evidence.

Doc. 37--Information from 636-937-0261

Cassandra has moved to suppress the evidence acquired by the interception of wire communications over her telephone number 636-937-0261. She alleges that the government's August 22, 2002, application for interception of wire communications over that telephone number (Gov. Ex. B-1) incorrectly states in paragraph 4(d) that the subject telephone number had been and would be used in the distribution of cocaine, crack cocaine, and marijuana; however, no evidence has ever been disclosed that defendants were involved with trafficking in those drugs. Cassandra maintains that

the government's "boilerplate language" in the application was false and misleading.

The statutory provision at issue here mandates that the application for an order authorizing or approving the interception of a wire communication shall include "a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including . . . details as to the particular offense that has been, is being, or is about to be committed." 18 U.S.C. § 2518(1)(b)(i).

Notwithstanding that (1) Agent Chinoski's seventy-two page supporting affidavit (Gov. Ex. B-2) is incorporated by reference into the government's August 22 application (Gov. Ex. B-1 ¶ 4), (2) the affidavit details the investigation into the alleged conspiracy involving BD, a controlled substance analogue, and (3) the August 22 application additionally refers to offenses involving "a controlled substance analogue," the undersigned is concerned with the application's unsupported reference to cocaine, crack cocaine, and marijuana.

However, because the execution of the August 22 order was done in good faith, the evidence it produced should not be excluded. See United States v. Leon, 468 U.S. 897, 923-25 (1984) (the Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid); United States v. Lindsey, 284 F.3d 874, 877-78 (8th Cir.) (electing not to reach the question of whether a search warrant was supported by probable cause, because the Leon good-faith exception supported the admissibility of the evidence seized pursuant to the warrant), cert. denied, 123 S. Ct. 334 (2002); United States v. Moore, 41 F.3d 370, 376 (8th Cir. 1994) (the Leon principle applies to § 2518(10)(a) suppression issues), cert. denied, 514 U.S. 1121

(1995). Nothing in the record indicates the government acquired any evidence about cocaine or marijuana about which defendant could complain and defendant's argument establishes that what occurred was a non-prejudicial scrivener's error. Excluding the reference to cocaine and marijuana, the application and the court's approval thereof remain lawful.

In addition, Cassandra argues, as she did in her motion to suppress the email interceptions (Doc. 36), that the government failed to satisfy § 2518(1)(c)'s requirements. She points to alleged inconsistencies in the various affidavits submitted in support of the applications for email interception, telephone interceptions, and continued interceptions and concludes that "the Government will provide the Court with false information to obtain what it wants." The undersigned believes that many of the alleged inconsistencies are not in fact inconsistent. For example, Cassandra maintains that Agent Chinoski's September 13, 2002 affidavit in support of the application for a second extension of electronic communications (Gov. Ex. A-24) states that the telephone is not a means of communications with defendants, yet Agent Chinoski "lists people who allegedly contact Defendant to further the drug relationship," citing paragraph 25. Paragraph 25, however, mentions only one person and does not specify how that individual communicated with Cassandra.

Moreover, in some of her other arguments, Cassandra did not specify the portions of documents her arguments relied on. For example, she submits Agent Chinoski averred in support of the application to intercept the email communications (Gov. Ex. A-2) that Cassandra conducted her business by email, not by telephone, but Cassandra has not specified what paragraph or page number in that sixty-page document states that she does not communicate with her customers by telephone. In fact, in paragraph 49 of that affidavit, Agent Chinoski summarizes a proffer by an individual who

claimed that he had purchased BD from Cassandra and that in 2001 she telephoned him to inform him that he had not sent enough money to cover his order.

Cassandra also argues that paragraph 40 of Gov. Ex. A-24 incorrectly stated that normal investigative techniques have been tried and failed and appear reasonably unlikely to succeed if tried. She argues that the government was then intercepting electronic communications, that it stated said defendant's email address was her primary source of communication with her customers, and that a confidential source, as described in paragraph 54, was being used but had not yet engaged defendant in a conversation. Thus, she argues that an electronic interception was premature. Cassandra's arguments on this point are not compelling.

She argues that paragraph 57 of the August 22, 2002, affidavit states that the content of electronic communications has been business related and that evidence of criminal activity would be by telephone. This, she argues, contradicts the earlier statements by the affiant, such as in paragraph 38 of the August 6, 2002, affidavit submitted for the extension of interception of electronic communications, wherein the affiant stated that the only real evidence of criminal activity can be found in electronic communications. Cf., Finding of Fact 13c. Defendant argues that the government misinformed the court.

The undersigned disagrees. At most, defendant's arguments illustrate the evolving nature of the investigation over time.

Doc. 33--Findings 48a, b, d, e, g, i, j, and k

Cassandra has moved to suppress as evidence eight items of property and evidence the government seized while executing court-ordered warrants. (Doc. 33.) She argues that the affidavits submitted in support of the warrants contained information based upon the generally asserted illegal interception of electronic

communications for the BWIZE address and the 636-937-0261 telephone number. She also argues that all physical evidence seized from her possession was illegally seized without a warrant based upon probable cause.

Pursuant to 21 U.S.C. § 881(a)(6), all money furnished or intended to be furnished in exchange for illegal drugs, all drug proceeds, and all money used or intended to be used to facilitate illegal drug trafficking is subject to civil forfeiture. Moreover, a seizure warrant may be issued for many categories of items, including (1) evidence of a crime, (2) fruits of crime, or (3) property designed for use, intended for use, or used in committing a crime. Fed. R. Crim. P. 41(c)(1)-(3). "After receiving an affidavit or other information, a magistrate judge . . . must issue the warrant if there is probable cause to search for and seize a person or property under Rule 41(c)." Fed. R. Crim. P. 41(d)(1). "Probable cause" means a fair probability that evidence of a crime will be found in a particular place. United States v. Chrobak, 289 F.3d 1043, 1046 (8th Cir. 2002).

As already discussed in great detail, the Title III interceptions of the BWIZE communications were proper and the evidence obtained from wire communications over telephone number 636-937-0261 should not be excluded, given the good-faith exception to the exclusionary rule. See 18 U.S.C. §§ 2516(1), 2518(1) and (5); Leon, 468 U.S. at 923-25. Accordingly, evidence obtained from those emails and telephonic interceptions could be--and were--considered in the probable cause determination for the issuance of the seizure warrants. Cf. Wong Sun v. United States, 371 U.S. 471, 488 (1963) (discussing "fruit of the poisonous tree" doctrine).

Docs. 34-35, 40-41

Cassandra has moved to suppress the evidence seized by the government at WAC Industries (Doc. 34); 119 North Second Street and

1377 Scenic Drive (Doc. 35); Cycle 5 (Doc. 40); and Bank Star, Safe Deposit Box 81 (Doc. 41). She argues that the supporting affidavits contained information based on the generally asserted illegal interception of electronic communications for the BWIZE account and the 636-937-0261 telephone number.

For the same reasons that the evidence obtained from the execution of the above-noted seizure warrants should be admissible, so too is the evidence seized at these five locations.

Doc. 38--communications with attorney

Cassandra has moved to suppress as evidence the communications between her and her attorney,[8] arguing that on August 23, 2002, the government applied for authorization to intercept such communications because they would constitute evidence of ongoing criminal money laundering. The affidavit describes communications between her and her attorney, but, defendant argues, they do not indicate that Cassandra and her attorney were in any fashion involved in money-laundering. Thus, Cassandra concludes that the affiant does not make a prima facie showing that the legal advice was obtained in furtherance of a criminal activity.

The attorney-client privilege, the oldest and most venerated of the common law privileges of confidential communications, serves important interests in our judicial system. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Nevertheless, despite its venerated position, the privilege is not absolute and is subject to several exceptions. "Under the crime-fraud exception to the attorney-client privilege, the privilege can be overcome where communication or work product is intended to further continuing or future criminal or fraudulent activity." United States v. Edwards, 303 F.3d 606, 618 (5th Cir. 2002) (internal quotes omitted), cert.

[8]There is nothing in the record to indicate that the subject attorney ever represented defendant in this criminal action.

denied, 123 S. Ct. 1272 (2003). "Whether the attorney is ignorant of the client's purpose is irrelevant." United States v. Horvath, 731 F.2d 557, 562 (8th Cir. 1984).

"To overcome a claim of privilege using the 'crime-fraud' exception, the government must merely make a prima facie showing that the legal advice has been obtained in furtherance of an illegal or fraudulent activity." Id. "A prima facie showing requires presentation of evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met." In re Grand Jury Subpoena, 223 F.3d 213, 217 (3d Cir. 2000) (internal quotations omitted).

> A party wishing to invoke the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime. This is a two-step process. First, the proposed factual basis must strike "a prudent person" as constituting "a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof." In re John Doe[, Inc., 13 F.3d 633, 637 (2d Cir. 1994) (quoted case omitted)]. Once there is a showing of a factual basis, the decision whether to engage in an *in camera* review of the evidence lies in the discretion of the district court. [United States v.] Zolin, 491 U.S. [554, 572 (1989)]. Second, if and when there has been an *in camera* review, the district court exercises its discretion again to determine whether the facts are such that the exception applies.

United States v. Jacobs, 117 F.3d 82, 87 (2d Cir. 1997).

In this case, the undersigned believes that the government provided a sufficient factual basis by way of the affidavit that summarized conversations in which defendants discussed (1) setting up accounts for the transfer of money and living abroad, (2) a meeting with an unnamed attorney who provided legal advice about

the government's ability to seize assets involved in illegal drug trafficking, (3) Cassandra's plan to see the lawyer, and (4) protecting their assets from the DEA. See id.; Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 283 (8th Cir. 1984) ("Timing is critical, for the prima facie showing requires that the 'client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further the scheme'") (quoting In re Murphy, 560 F.2d 326, 338 (8th Cir. 1977).)

Doc. 39--pen register and caller identification evidence

Cassandra has moved to suppress evidence of pen-register and enhanced-caller-identification evidence regarding 636-937-0261, because this evidence was acquired in violation of 18 U.S.C. §§ 2701-2711 of the Electronic Communications Privacy Act of 1986, and her Fourth and Fifth Amendment rights. She also seeks the suppression of all "fruit of the poisonous tree" information.

Cassandra has not specified what part of the Privacy Act she believes has been violated. In any event, "suppression is unavailable under the Electronic Communications Privacy Act." United States v. Bach, No. CRIM.01-221 PAM/ESS, 2001 WL 1690055, at *5 (D. Minn. Dec 14, 2001), rev'd on other grounds, 310 F.3d 1063 (8th Cir. 2002), cert. denied, 123 S. Ct. 1817 (2003); see 18 U.S.C. §§ 2707(a) (providing for a civil cause of action), 2708 (exclusivity of remedies).

Unlike Title III's complex requirements, that which is needed to obtain installation of a pen register, including an enhanced caller identification device, is relatively simple. "Upon an application made under [18 U.S.C. §] 3122(a)(1), the court shall enter an ex parte order authorizing the installation and use of a pen register or trap and trace device anywhere within the United States, if the court finds that the attorney for the Government has certified to the court that the information likely to be obtained

by such installation and use is relevant to an ongoing criminal investigation." 18 U.S.C. § 3123(a). The government's initial application for such an order (Gov. Ex. C-1) and each of its extension applications (Gov. Exs. C-2 to C-12), contain the requisite certification. In addition, they were made in compliance with § 3122(a)(1). See 18 U.S.C. § 3122(a)(1) (application for an order or extension of an order under § 3123 should be "in writing under oath or equivalent affirmation, to a court of competent jurisdiction").

Even if the government had not complied with §§ 3122 and 3123, suppression would not be warranted under the Fourth Amendment. See Smith v. Maryland, 442 U.S. 735, 745-46 (1979) (the installation and use of a pen register is not a search within the meaning of the Fourth Amendment); see also United States v. Fregoso, 60 F.3d 1314, 1320 n.3 (8th Cir. 1995). Likewise, there was no Fifth Amendment violation. See United States v. Nunez, 658 F. Supp. 828, 835 (D. Colo. 1987) (there is no Fifth Amendment violation in using these methods since the communications are voluntary (citing Hoffa v. United States, 385 U.S. 293, 303-04 (1966)).

Doc. 43--Earthlink records

Cassandra has moved to suppress the evidence obtained in the execution of the June 13, 2002, search warrant for Earthlink's records of her use of the BWIZE address. She asserts that she had a reasonable expectation of privacy that Earthlink would not share her records with anyone other than its employees. Next, she contends that the warrant was not properly issued, invalid on its face, and not based upon probable cause. She also argues that any handwriting exemplars obtained from Earthlink were obtained from Earthlink in violation of her right to be free from being compelled to be a witness against herself.

These arguments are not compelling. First, whether Cassandra had a legitimate expectation of privacy in her records at Earthlink is significant only to the extent of determining whether the Fourth Amendment protects those records in general, not whether a properly issued, facially valid warrant, and based upon probable cause, allows for the search and seizure of such records. See United States v. Bach, 310 F.3d 1063, 1066 (8th Cir. 2002) ("If there is no legitimate expectation of privacy, then there can be no Fourth Amendment violation."), cert. denied, 123 S. Ct. 1817 (2003); see generally United States v. Green, 275 F.3d 694, 699 (8th Cir. 2001) (legitimate-expectation-of-privacy test). Second, for reasons already discussed with respect to the validity of Title III interceptions of electronic communications, the undersigned disagrees with defendant's unsupported contention that the search warrant was not properly issued, invalid on its face, and not based upon probable cause. See Gates, 462 U.S. 213, 233-34 (1983) (totality-of-the-circumstances standard); Smithson, 235 F.3d at 1062. Moreover, the Title III requirements are more exacting than that which is needed for a simple search warrant.

Doc. 44--PayPal evidence

Cassandra has moved to suppress the evidence obtained in the execution of the May 31 and September 13, 2002, search warrants for PayPal's information and documents relating to the BWIZE address. She argues that the supporting affidavits did not establish probable cause in that paragraphs 17 through 19 of the affidavit contain hearsay information obtained in the course of a proffer.

The hearsay argument is not well grounded. See Hunter v. Namanny, 219 F.3d 825, 830 (8th Cir.2000) ("probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge"); Corder v. Rogerson, 192 F.3d 1165, 1168 (8th Cir. 1999) (the full

panoply of adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment).

Doc. 78--Joshua's statements

Joshua has moved to suppress statements made when he was arrested.[9] He maintains that his statements were not made voluntarily, that he was subjected to mental and physical duress during the interrogation, and that he was not advised of, and did not waive, his rights.

The rule in Miranda requires that any time a person is taken into custody for questioning, a law enforcement officer must, prior to questioning, advise the individual of his right to be free from compulsory self-incrimination and his right to the assistance of counsel. Miranda v. Arizona, 384 U.S. 436, 444 (1966). A custody determination requires the court to carefully assess "the totality of the circumstances." United States v. Hanson, 237 F.3d 961, 963 (8th Cir. 2001).

The government has the burden of establishing admissibility of Joshua's statements by a preponderance of the evidence. See Colorado v. Connelly, 479 U.S. 157, 169-70 (1986); United States v. Astello, 241 F.3d 965, 966 (8th Cir.), cert. denied, 533 U.S. 962 (2001). "A waiver of the Fifth Amendment privilege against self-incrimination is valid only if it is made voluntarily, knowingly, and intelligently." United States v. Ortiz, 315 F.3d 873, 885 (8th Cir. 2002). "A waiver is voluntary if it is 'the product of a free and deliberate choice rather than intimidation, coercion, or deception.'" Id. (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)).

[9]On October 18, 2002, prior to the filing of Doc. 78, Joshua was represented by a different attorney who filed a motion to suppress evidence and statements. (Doc. 29.) The October motion, as it concerns statements, involves the same legal analysis and recommended disposition as Doc. 78.

The government has shown that Joshua was advised of--and waived--his Miranda rights prior to his post-arrest questioning, and no evidence indicates that any law enforcement officer intimidated, deceived, or coerced defendant into making any statements. See Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare.").

Doc. 77--Scenic Drive evidence

Joshua has also moved to suppress physical evidence seized from the execution of the search warrant at the Scenic Drive residence, arguing, as relevant, that the warrant was not supported by probable cause and that, prior to effecting entry, the officers did not announce themselves.

These arguments are not compelling. In addressing Cassandra's motions to suppress (including Doc. 35), the undersigned has already determined that the evidence seized from the search of the Scenic Drive residence is admissible, i.e., Agent Chinoski's affidavit provided the requisite probable cause showing, and the good-faith exception to the exclusionary rule is applicable. Moreover, as to Joshua's specific argument regarding the execution of the warrant, the uncontradicted evidence from the hearing demonstrates that the officers repeatedly knocked and announced their presence before forcing entry into the residence. See 18 U.S.C. § 3109 (permitting an officer to break open any door of a house to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance); United States v. Foreman, 30 F.3d 1042, 1043-44 (8th Cir. 1994) (it is the defendant's burden to establish a prima facie violation of § 3109).

Doc. 30--surveillance evidence

In a generalized one-paragraph motion, Joshua has moved to suppress the fruits of illegal electronic and other surveillance. For the reasons already specified with respect to Cassandra's motions, the undersigned believes that the evidence obtained pursuant to the relevant warrants is admissible.

Thereupon,

IT IS HEREBY ORDERED that the motions of defendant Cassandra Harvey for disclosure of results or reports of any scientific tests or experiments (Doc. 20), for disclosure of written summaries of testimony of expert witnesses (Doc. 21), and for production of evidence seized (Doc. 23) are denied as moot.

IT IS FURTHER ORDERED that the motion of defendant Cassandra Harvey for an order compelling the government to cease any forfeiture proceedings and to release the assets of defendant (Doc. 22) is denied without prejudice to being refiled before the District Judge for determination at trial.

IT IS FURTHER ORDERED that the motions of the United States for the continued detention of defendants Cassandra Harvey (Doc. 52) and Joshua Harvey (Doc. 53) are granted.

IT IS FURTHER ORDERED that the motion of defendant Cassandra Harvey for severance of defendants (Doc. 42) is denied without prejudice.

IT IS HEREBY RECOMMENDED that the motions of defendant Cassandra Harvey to suppress items seized pursuant to seizure warrants (Doc. 33), to suppress as evidence the information received pursuant to a search warrant on WAC Industries (Doc. 34), to suppress evidence seized from the person and home of defendant (Doc. 35), to suppress interception of electronic communications (Doc. 36), to suppress interception of wire communications (Doc. 37), to suppress wire communications with an attorney (Doc. 38), to suppress evidence of telephone records (Doc. 39), to suppress

evidence obtained from the search warrant served on Cycle 5 (Doc. 40), to suppress evidence seized from execution of a search warrant on the Bank Star (Doc. 41), to suppress evidence obtained pursuant to a search warrant on Earthlink, Inc. (Doc. 43), and to suppress evidence seized from PayPal.com, Inc. (Doc. 44) be denied.

IT IS FURTHER RECOMMENDED that the motions of defendant Joshua Harvey to suppress evidence and statements (Doc. 29), to suppress the fruits of illegal electronic and other surveillance (Doc. 30), to suppress physical evidence (Doc. 77), and to suppress statements (Doc. 78) be denied.

The parties are advised they have ten (10) days to file written objections to this Order and Recommendation. The failure to file objections may result in a waiver of the right to appeal issues of fact.

ORDER SETTING TRIAL DATE

As directed by the District Judge, this matter is set for a jury trial on the docket commencing September 8, 2003, at 9:00 a.m.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this _____ day of July, 2003.